No. 90-575

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

TIGER INN,

Petitioner,

—v.—

SALLY FRANK,

Respondent.

BRIEF IN OPPOSITION TO ISSUANCE OF THE WRIT OF CERTIORARI

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QUESTION PRESENTED

May New Jersey constitutionally apply its Law Against Discrimination to an 1800 member eating club that has an integral relationship of mutual benefit with Princeton University, a public accommodation?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, the Tiger Inn, The Ivy Club, The University Cottage Club, the Trustees of Princeton University, Sally Frank, and the New Jersey Division of Civil Rights. The University Cottage Club settled the case with Ms. Frank and did not participate in the proceedings before the New Jersey Supreme Court. All other parties listed above participated in the New Jersey Supreme Court hearings.

Respondent, Sally Frank, is an individual and therefore has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

OTHER AUTHORITIES:

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STATEMENT OF THE FACTS

Princeton University ("Princeton" or "the University") is a nonsectarian, residential institution of higher education founded in 1746 and located in Princeton, New Jersey. (Stip. #1 & 2, Ja 3157).[1] It was an all-male university until 1969

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1. "Stip" refers to the parties' stipulations as to undistiputed facts entered in the record. "Ja ____" refers to the Joint Appendix submitted to the New Jersey Appellate Division, which contained, inter alia, the stipulations.

(Stip. #24, Ja 3159), when it admitted women as undergraduates. (Stip. #3, Ja 3157).

In 1856, the University's dining hall burnt down. It was not replaced for many years. Students were then faced with finding alternative arrangements, which could not be fraternities because fraternities had been banned at approximately the same time. (Ja 1396, 1397, 1449). In 1879, a group of students joined together to form the Ivy Club ("Ivy") as a permanent eating and social facility for Princeton students. (Stip. #9, Ja 3157). The University Cottage Club ("Cottage") was the second to form in 1886 (Stip. #10, Ja 3157) and the Petitioner, Tiger Inn ("Tiger"), was third, forming in 1890. (Stip. #11, Ja 3158). Princeton took care that these organizations were not fraternities. Indeed, the clubs were seen as an "antidote to fraternities." (Ja 2076).

By 1979, when Ms. Frank instituted this action, Princeton had thirteen eating clubs. Five of the clubs were selective, choosing their new members through an interview process known as "bicker." Three of those clubs, the subjects of Ms. Frank's complaints, were all-male as well as selective. (Stip. #1, Ja 3160). The other eight were coed and nonselective, choosing their new members through a lottery system. (Stip. #28, Ja 3160).

The sophomore class at Princeton prepares, prints and pays for an annual booklet that discusses student eating options for the junior and senior years. The clubs assist the sophomore class in compiling the pamphlet, which, in 1984, was called Princeton's Guide to Academic and Social Life.

(Stip. #27, Ja 3160). This pamphlet serves to begin the selection process for all of the clubs. Each year students are organized for the selection process at the selective clubs, known as "bicker," by a committee chaired by a sophomore.[2] (Stip. #64, Ja 3164). The clubs work together to coordinate their selection procedures, with the nonselective clubs coordinating their sign-in procedures and the selective clubs coordinating bicker. (Stip. #64 & #75, Ja 3164). Spring bicker is held at the same time for all of the clubs, and registration for spring bicker is held at one place. (Stip. #72 & #73, Ja 3165).

Tiger is a large club consisting of over 1800 members. (Cert. Pet., p.3) This year, approximately 125 of those members were undergraduates. (Cert. Pet., p.3) According to Tiger's constitution, new undergraduate members are chosen by the undergraduate members "from the Senior, Junior, and Sophomore classes of Princeton University only, in accordance with the rules established by the University authorities." (Tiger Constitution, Ja 563). The other classifications for membership are graduate, associate, and honorary members (Stip. #189, Ja 3177). Upon graduation or leaving Princeton, undergraduate members automatically become graduate members. (Ja 563). In 1972, there were only six honorary members and fifteen associate members. (Ja 5597)

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2. In 1979, the degree of support for bicker from the University administration has varied. See Frank v. Ivy Club, 120 N.J. 73, 84-85 (1990). When Ms. Frank first bickered, students registered for bicker by completing one form, available in the Dean of Students Office, and depositing the form in that office. (Stip. #31, Ja 3152).

While Tiger requires a unanimous vote by a given year's undergraduate members to accept new undergraduate members (Stip. #90, Ja 3167), most applicants are, in fact, offered membership. In 1984, for example, 81.25 percent of the applicants for undergraduate membership in Tiger Inn received offers of membership, "bids." (Stip. #96, Ja 3167). All non-undergraduate members are elected to club membership by a three-fourth vote of the appropriate segment of the club. (Ja 563) Through 1983, Tiger participated in the "hat bid" system, a system under which the selective clubs guaranteed that any man who sought membership in all of the selective clubs and who kept every bicker appointment, but who did not receive an offer to join any club, would be guaranteed membership in one of the selective clubs. (Stip. #24, Ja 3151; Stip. #99, Ja 3168) In 1980, the club assignment for a hat bid was determined by a roll of the dice. (Ja 4831)

Tiger delegates the selection of new members to a small portion of its membership. Tiger advertises its fall bicker in the school paper. (Ja 1478, 1481, 1484). Club minutes repeatedly reflect Tiger's concern for obtaining a membership size that will help pay its bills. (Ja 5613, 5647). If bicker is successful, the undergraduate class size (number of admittees) is large. (Ja 5613, 5647)

The eating clubs constitute the primary dining option for upperclass students at Princeton. During the 1983-84 school year, 1570 out of 2230 juniors and seniors (more than 70%) had meal contracts with one of the thirteen eating clubs.

(Stip. #50, Ja 3163) Princeton's dining halls, as currently constituted, do not have the capacity to feed these 1570 extra students during meal hours. In fact, the University plans on the majority of its upperclass students eating in eating clubs. (Stip. #29, Ja 3152) Thus, as the New Jersey Division on Civil Rights found in a conclusion upheld by the New Jersey Supreme Court, Princeton relies on the eating clubs to feed a majority of its upperclass students. See Frank, supra, 120 N.J. at 91. Tiger is part of that system. It provides daily meal service to its members while school is in session. Nonmembers, including women, also eat regularly at the club. (Ja 3019-21, 3030)

The eating clubs, which hold parties regularly, also serve as centers for upperclass student social life. At times, these parties are advertised as open generally to the entire Princeton University community or to all sophomores. (Ja 1480, 2813, 2819). At other times, although passes are nominally required for admission to a party, the passes are available on request. (Ja 2821). Moreover, women are frequently admitted to parties at Tiger without having been given a pass. (Ja 1717-1719). Wives of graduate members frequent the club. (Ja 5692). Non-members also visit Tiger when it is rented for weddings or other affairs. (Ja 5602, 5614, 5626, 5664, 5672, 5674). The clubs do not, however, serve a major residential function for the University. In fact, very few members live at Tiger, or any of the other clubs. Thus, Tiger characterizes itself as a "social and dining facility," not a dormitory. (Ja 5028).

Throughout the clubs' history, Princeton has subjected

them to substantial regulation. Princeton has disciplined club members for activity in the clubs and at times has even disciplined officers for the activities of members of the club, holding the officers vicariously liable.[3] This regulation is accepted by Tiger Inn in its house rules, which state, inter alia:

> 6. No member of the freshman class nor first term sophomores shall be admitted to the Clubhouse, unless so authorized by University authorities ....
>
> 11. Undergraduate members are not allowed to consume alcoholic beverages in the clubhouse unless special permission has been secured by the Undergraduate President from the office of the Dean and the Board of Governors of the Club. (Ja 565)

Tiger's relationship with the University has remained close through the almost twelve years this lawsuit has been pending. Although Tiger recently claimed to sever a few of its superficial ties with Princeton, as recently as the fall of 1989, a section of a university class met regularly at Tiger Inn. (Aff. of Jennifer Weiner in Support of Motion of Princeton Undergraduates for Coeducated Eating Clubs to File an Amicus Brief in the New Jersey Supreme Court at para. 5). Moreover, Tiger continues to maintain a close relationship with the other clubs.

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3. On one of those occasions, those disciplined were officers of a club that was once a party to these proceedings. (Stip. #22, Ja 3151)

In short, the uncontested facts, as stipulated to by the parties and as explicitly found by the New Jersey Supreme Court, show that Tiger and Princeton "have an integral relationship of mutual benefit." Frank, supra, 120 N.J. at 110. The conclusion of Tiger Inn's own official history underscores Tiger's close relationship with Princeton:

> Through all these first fifty years one thing, above all others, had remained typical of Tiger Inn -- the loyalty of undergraduates and alumni alike. No one who had kept in close touch with the Club could doubt this loyalty. And all Tiger Inn men could be proud of the fact that affection for the Club had been secondary to a love of Princeton without which loyalty to Tiger Inn would be meaningless. (Ja 543).

PROCEDURAL HISTORY

Respondent, Sally Frank, enrolled in Princeton as a first-year student in September, 1976. She was graduated with an A.B. degree in 1980. (Stip. #103, Ja 3168) During her sophomore, junior, and senior years, Ms. Frank attempted to join each of Princeton's all-male eating clubs. After being denied membership in Ivy and denied the opportunity even to bicker at Tiger and Cottage during her junior year because of her sex (Stip. #'s 106 & 107, Ja 3168), Ms. Frank filed discrimination complaints against Princeton and each of the three all-male clubs in February, 1979.

The New Jersey Division on Civil Rights ("Division")

initially refused to process these complaints. When Ms. Frank was once again denied membership and the opportunity to bicker during her senior year, she refiled the complaints. This time, the Division issued the verified complaints in December, 1979. In December, 1981, after a cursory investigation, the Division dismissed the complaints, and Ms. Frank appealed. The New Jersey Appellate Division reversed and remanded the case for further investigation and fact finding in August, 1983.

The Division then conducted a thorough investigation of her complaints, holding two day-long fact finding conferences at which it heard testimony from a witness for each party and accepted over 200 stipulations agreed upon by the parties. It also accepted thousands of pages of documents from each party. Following the investigation, on May 14, 1985, the Director of the Division ("Director") issued a Finding of Probable Cause and found that the Division had jurisdiction over the complaints.

The case was then transferred to the New Jersey Office of Administrative Law ("OAL") for hearings. The Director granted Ms. Frank's motions for partial summary decision on jurisdiction and on liability based on the uncontested facts in the stipulations and documents in the record. Ms. Frank settled her claims against Cottage after it agreed to admit women in February, 1986. In July, 1986, Ms. Frank settled almost all of her claims against Princeton, which, however, remained a party to the case. A formal six-day hearing on remedy took place in the OAL in July and August, 1986.

Following the hearing, the Administrative Law Judge ("ALJ") recommended to the Director that Ivy and Tiger be ordered to sever their ties with Princeton rather than requiring them to admit women; that Ms. Frank be paid damages for the harassment she suffered as a student challenging the clubs' discriminatory practices; and that she not be awarded membership in the clubs. Ms. Frank and Princeton filed exceptions to these recommendations with the Director. In May 1987, the Director ordered Tiger and Ivy to admit women as members and doubled the damages they were required to pay to Ms. Frank, but declined to order them to offer membership to Ms. Frank.

Tiger and Ivy appealed the order of the Director. In October, 1988, the New Jersey Appellate Division reversed and remanded on the procedural ground that summary decision was improper and that a hearing should have been held on all issues. Ms. Frank then sought state Supreme Court review of the decision. Finding that there were no material facts in dispute requiring hearings on jurisdiction or liability and that the Director's remedial order was appropriate, the New Jersey Supreme Court reversed the Appellate Division and reinstated the Director's order on July 3, 1990. The instant Petition for certiorari followed.[4]

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4. Ivy Club chose not to request certiorari. Instead, it pursued a 42 U.S.C. Section 1983 suit against the state and Ms. Frank, claiming its rights are being violated. When the federal District Court Judge refused to enjoin the state from enforcing the New Jersey Supreme Court ruling, Ivy admitted women.

REASONS FOR DENYING THE WRIT

I. THE NEW JERSEY SUPREME COURT DECISION APPLYING ITS STATE LAW AGAINST DISCRIMINATION TO REMEDY TIGER INN'S CLEAR SEX DISCRIMINATION CONFORMED TO THE SETTLED LAW OF THIS COURT.

In asking for review of the New Jersey Supreme Court's decision that blatant sex discrimination by Princeton University eating clubs violates the state's Law Against Discrimination, Tiger Inn points neither to any novel question of law nor to any conflict between the circuits. Nor could it. Instead, it attempts to invoke clear principles of law set forth in three recent cases, all upholding state anti-discrimination laws against challenges based on freedom of association and all issued without dissent by this Court since 1984. Moreover, in its attempt to come within the purview of Roberts v. U.S. Jaycees, 468 U.S. 609 (1984); Bd. of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537 (1987); and New York State Club Ass'n v. City of New York, 108 S. Ct. 2225 (1988), Tiger ignores both the facts and the reasoning of these decisions.

Disregarding these clear and consistent holdings, Tiger's Petition for Certiorari would have this Court accord to the club First Amendment protection as an intimate association for its consistent practice of discriminating against women.[5] Tiger is, however, unable to show it is the type of intimate association the Constitution was designed to protect.

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5. Tiger makes no pretense of a claim to expressive association.

Tiger Inn neither furthers the purpose this Court has identified for protecting intimate associations, nor does it satisfy the criteria that this Court repeatedly set forth for identifying such associations. As the cases make clear, the purpose of protecting intimate associations is to ensure that individuals are able to enter into and maintain the special sort of ties that are essential to emotional enrichment and definition of one's identity. Jaycees, supra, at 619; Rotary Club, supra, at 544. Though the Court has not marked the precise boundaries of the type of private or intimate association it accords constitutional protection, it has pointed repeatedly to family-like relationships as the prototype intimate association. Jaycees, supra, at 619-620; Rotary Club, supra, at 545.[6] Thus this Court has "emphasized the First Amendment protected those relationships, including family relationships that presuppose 'deep attachments and commitments to the necessarily few individuals with whom one shares not only a special community of thoughts, experiences and beliefs but also distinctly personal aspects of one's life.'" Rotary Club, supra, at 545, quoting Jaycees, supra, at 619-620.

The Court has set forth a list of those factors to assist in identifying those special relationships meriting constitutional protection. Such intimate associations "are

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6. For example, Justice Powell pointed out in Rotary Club that the "the intimate relationships to which we have accorded constitutional protection include marriage, Zablocki v. Redhail, 434 U.S. 374 (1978); the begetting and bearing of children, Carey v. Population Services Int'l, 431 U.S. 678 (1977); childrearing and education, Pierce v. Society of Sisters, 268 U.S. 510 (1925); and cohabitation with relatives, Moore v. East Cleveland, 431 U.S. 494 (1977) (parallel citations omitted.supra, 481 U.S. at 545.

distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship," Jaycees, supra, at 620. Further, even if an organization is sufficiently small, selective, seclusive and otherwise private as to merit protection as an intimate association, it still may be subjected to state legislation if necessary to serve a compelling state interest. Moreover, New Jersey's public accommodations law, like those before the Court in Jaycees, Rotary Club, and New York State Club Ass'n., "plainly serv(e) compelling state interests of the highest order." Jaycees, supra, at 624, quoted in Rotary Club, supra, at 549.

A. Tiger Fails to Meet the Criteria for Protection Clearly Set Forth by this Court.

In its 1984 Jaycees opinion, explicitly reaffirmed in Rotary and New York State Club Ass'n, this Court clearly outlined the criteria for invoking the right of intimate association. Like the clubs involved in those cases, Tiger Inn fails to show it is the sort of small, selective and secluded organization that merits constitutional protection.

Size. As it itself concedes, Tiger has over 1800 members. Thus Tiger's membership is almost ten times the size this Court considered too large for constitutional protection in Rotary Club, supra, 481 U.S. at 546, and far bigger than the 400 or so member chapters that the Court found too big in Jaycees, supra, 468 U.S. at 621. Similarly, the New York City law upheld in New York State Club Ass'n,

supra, 108 S. Ct. at 2233, regulated New York City clubs with 400 or more members.

Indeed, given Tiger's size, it is highly unlikely that all of Tiger's 1800 members have even met one another, much less developed close personal relationships, particularly in cases where there may be as much as 70 years between their admissions. Tiger Inn attempts to avoid the clear holdings of these three cases by seeking to distinguish active undergraduate and inactive graduate members. There is, of course, no basis for disregarding Tiger's approximately 1675 alumni members. Moreover, in asserting that the undergraduate body -- whose membership changes annually -- amounts to an intimate association, Tiger simply ignores the fact that its 125-man membership is more than six times that found not to merit constitutional protection in Rotary Club, supra, 482 U.S. at 546.

Selectivity. There are at least three reasons why the process by which Tiger's members are chosen does not demonstrate the necessary selectivity for constitutional protection. First, most applicants are admitted to Tiger. For example, in 1984, 81.25 percent of the applicants were offered membership. Tiger's concern to maintain a certain undergraduate membership size to break even for its meal service may well explain this lack of selectivity. Second, Tiger delegates membership selection to a small and changing segment of the club. Under this delegation, the vast majority of Tiger's members never meet, let alone choose to form personal ties with the new members. Third, Tiger's participation in the "hat-bid" system until 1983, by which it

agreed to accept any person assigned to the club literally by a roll of the dice, demonstrates a willingness to share membership with any Princeton male. In sum, Tiger admissions have little to do with the sort of intimate associations and personal relationships the Constitution shields from government interference.

Seclusivity. The third specific criterion set forth by this Court, seclusivity, refers to the degree to which association activities are limited to group members. Critical to the Court's decisions in the Jaycees, Rotary Club and New York State Club Ass'n cases was the important role that strangers play in all three types of clubs. Thus the Court pointed to the fact that, "rather than carrying on their activities in an atmosphere of privacy, [the clubs] seek to keep their windows and doors open to the whole world," Rotary Club, supra, at 547. Indeed, it is the presence of strangers that distinguishes the public from the private, for, as this Court said in New York Club Ass'n, "[i]t may well be that a considerable amount of private or intimate association occurs in [a club] setting, as is also true in many restaurants and other places of public accommodation, but that fact alone does not afford the entity as a whole any constitutional immunity to practice discrimination when the Government has barred it from doing so." supra, 108 S. Ct. at 2233-2234.

The provision of dining and social life are the essence of Tiger Inn's functions. As a result of undergraduates continuously bringing guests to meals, alumni returning with their families, parties being advertised as open to the whole community or through invitations available to anyone seeking

them, nonmembers are a central part of these critical functions. Further, the club is rented out to members or their relatives for non-club functions which are obviously attended by numerous nonmembers. Moreover, Tiger claims no interest in excluding women. Indeed, the members of Tiger affirmatively choose to associate with women when participating in club functions. The nonmembers who visit the club are frequently women. Women may be present at every meal and at all parties. Tiger merely wishes to keep those women in an inferior, nonmember status. The desired and consistent presence of strangers means that Tiger cannot claim constitutional protection for such preferences.

In short, Tiger Inn is not a small, selective, and secluded association requiring First Amendment protection. There is no question that members of Tiger do not share the sort of intimacy which, if not protected, would deny any fundamental liberty to its members. For Tiger simply cannot meet the criteria clearly set forth by this Court in its three recent cases, and it has shown no reason for their reevaluation.

B. The Only Unique Consideration Operative in this Case Is the Symbiotic Relationship Between Tiger Inn and Princeton University, Which Is a Special Factor Further Undercutting Tiger's Claim of Intimate Association.

As the Jaycees decision made clear, in addition to the three criteria analyzed above, special factors may be pertinent in particular cases. Jaycees, supra, 468 U.S. at 620.

Both the New Jersey Supreme Court and the Division on Civil Rights specifically found, on the basis of undisputed facts, that Tiger and Princeton "have an integral relationship of mutual benefit." Frank, supra, 120 N.J. at 92, 110. The Division and Court findings were based on substantial evidence and turned on their close understanding of the role of the club system at Princeton University. Reviewing the facts carefully, the Division gave little weight to Tiger's present financial and legal independence from the University. Frank, supra. 120 N.J. at 103. Far more relevant to both bodies were the facts that Tiger holds itself out as part of a club system which serves Princeton students; that Tiger draws its membership almost exclusively from Princeton students; and that Princeton relies on the club system to feed a majority of the upperclass students. Id. Thus, in the New Jersey Supreme Court's words, "[t]he finding of an integral and symbiotic relationship is based on the undisputed factual conclusions that the Clubs [Tiger and Ivy] need the University and the University needs the Clubs, rather than on any particular act of control or integration." Frank, supra, 120 N.J. at 104.

Having sought unsuccessfully to divert attention from the real workings of the club system and Tiger's role in it in the New Jersey agency and court, Tiger seeks once again to focus attention on "the assiduously maintained legal separateness of the club." Frank,supra, 120 N.J. at 103. In doing so, however, it would have this Court simply ignore these clear findings and retry the matter de novo.

Tiger's attempt to dispose of the findings below underscores the significance of the special considerations at play in this case. Princeton is unquestionably a public accommodation. Peper v. Princeton University Board of Trustees, 77 N.J. 55, 67 (1978). As the New Jersey Supreme Court stated, "[w]here a place of public accommodation and an organization that deems itself private share a symbiotic relationship, particularly where the allegedly 'private' entity supplies an essential service which is not provided by the public accommodation, the servicing entity loses its private character." Frank, supra, 120 N.J. at 104, citing Hebard v. Basking Ridge Volunteer Fire Co., 104 N.J. Super. 77 (App. Div. 1978), cert. denied, 81 N.J. 294 (1979); Franklin v. Order of United Commercial Travellers, 590 F. Supp. 225 (D. Mass. 1984); Adams v. Miami Police Benevolent Ass'n, 454 F.2d 1315 (5th Cir. 1972) cert. denied, 409 U.S. 843 (1972).

Given the reality of the integral connection between Tiger and the University, providing shelter to Tiger's discriminatory practice has little to do with fostering the type of close personal ties that underlie the protection accorded intimate associations. As the unique relationship between Tiger and Princeton makes crystal clear, neither First nor Fourteenth Amendment rights are in jeopardy here.

C. Even If Tiger Inn Did Have a Right to Intimate Association, the State's Compelling Interest in Ending Discrimination Allows It To Limit that Right

Although Tiger Inn clearly has no claim of intimate

association, even if it did, that right would not be absolute. As the Jaycees, Rotary Club and New York State Club Ass'n cases make plain, the government may abridge or interfere with that First Amendment associational right when the government is pursuing a compelling state interest that cannot be achieved by means less restrictive of the freedom of association. Jaycees, supra, 468 U.S.at 623; Rotary Club, supra, 481 U.S.at 549; New York State Club Ass'n, supra, 108 S. Ct. at 2233-2234. Moreover, this Court has made crystal clear that the interest in preventing discrimination based on sex, the very claim in the case at bar, meets the compelling interest test. For New Jersey, in particular, "the eradication of the 'cancer of discrimination' has long been one of [the] state's highest priorities." Dixon v. Rutgers, The State University, 110 N.J. 432, 451 (1988), quoting from Fuchilla v. Layman, 109 N.J. 319, 334 (1988), cert. denied, 109 S. Ct. 75 (1988).[7]

The State surely has a compelling interest in freeing its citizens from the penalties of sex discrimination. Discrimination based on sex "is peculiarly repugnant in a society which prides itself on judging each individual by his or her merits." Peper v. Princeton University Board of Trustees, supra, 77 N.J. at 80 (1978). Moreover, it is clear that the order herein uses the least restrictive means to accomplish

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7. N.J.S.A. 10:5-3 states that "The Legislature finds and declares that practices of discrimination against any of its inhabitants because of ... sex ... are a matter of concern to the government of the State and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundations of a democratic State.

that compelling interest, for Tiger is still able to choose which women to admit. No individual woman, not even Ms. Frank, is forced on Tiger by the order. Thus, even assuming Tiger could legitimately assert a claim to protection as an intimate association, any such claim is outweighed by the State's need to eradicate discrimination and the narrowly tailored means its highest court approved for doing so.

II. CONTRARY TO THE ARGUMENTS OF PETITIONER AND AMICUS, THIS CASE DOES NOT INVOLVE FRATERNITIES.

Petitioner and amicus have urged this Court to grant certiorari on the assertion that the single sex status of all fraternities in the country have been placed in jeopardy by the decision below, despite the fact that there is no evidence or basis for believing that fraternities throughout the nation are even threatened by the ruling now before the Court.

In many states there would be no question that fraternities would not be subject to attack under their public accommodations laws. Ten states lack public accommodations laws and six of the states and the federal government that prohibit discrimination in public accommodations do not bar sex discrimination. See Discrimination on Campus: A Critical Examination of Single-Sex College Social Organizations, 75 Cal. L. Rev. 2117, 2125 (1987). The New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq., is one of the broadest anti-discrimination laws

in the country. Its exemption for only "distinctly private" clubs is narrower than other private club exemptions. Thus fraternities are not vulnerable nationally.

There is not even evidence that fraternities in New Jersey would be found to be barred from discriminating. Princeton's eating clubs have a unique history and status at Princeton. If a fraternity case came before it, the New Jersey Supreme Court might well limit its ruling to the facts of the instant case and find that fraternities are distinctly private clubs.

Petitioner and amicus also fail to show that if fraternities as single sex institutions are as valued as the petitioner and amicus imply, New Jersey's legislators will not act to shield their discriminatory practices in the same way that the federal government has shielded them from its law barring sex discrimination in educational institutions receiving federal funds. 20 U.S.C. Sec. 1681(a). Thus, the New Jersey legislature as a representative body,like any legislature, is perfectly capable of exempting from its anti-discrimination laws groups that it finds valuable.

Moreover, Tiger's argument ignores the fact that Tiger Inn is not a fraternity. Princeton in fact banned fraternities in 1856 and expelled students for having joined fraternities. The eating clubs were seen as an "antidote to fraternities", and Princeton has not recognized any fraternity on campus since. Thus, the argument appears to be that this Court should grant certiorari because, even if Tiger is not a fraternity and could constitutionally be required to admit women, some

fraternities on some other campuses might deserve constitutional protection and might be attacked in the future. In other words, they suggest that the ruling in this single case would apply to fraternities throughout the country.

This Court rejected such an overbreadth argument in New York State Club Association, 487 U.S. supra at 14. In that case, the Court endorsed the decision in Broadrick v. Oklahoma, 413 U.S. 601, 615-16 (1973), that said "whatever overbreadth may exist should be cured through case-by-case analysis of the fact situations to which its sanctions, assertedly, may not be applied." The New Jersey Supreme Court decision carefully analyzed the facts surrounding Tiger Inn to determine if the state anti-discrimination law should apply. It also upheld the Division's analysis of Tiger which helped it determine that Tiger had no claim to freedom of intimate association. There is, however, no evidence in the record on the workings of any specific fraternity to help this Court determine whether a fraternity could be constitutionally required to admit women. Therefore, this Court should not grant certiorari on this case based on the speculation that fraternities could be affected.

Indeed, the record and facts clearly show that Tiger is not a fraternity. Unlike fraternities on most college campuses, Tiger does not have a large percentage of its student members living in its building. Thus, unlike most fraternities, Tiger does not function as a dormitory. If Tiger were primarily a dormitory, it might have been exempt from the New Jersey Law Against Discrimination, which exempts single sex housing from its reach. N.J.S.A. 10:5-12(g).

Essential to the New Jersey Supreme Court conclusion that Tiger is a public accommodation was its finding that Tiger and the other clubs would not exist were it not for Princeton University:

It would be disingenuous for the Clubs to assert that they could ever exist apart from Princeton University. The Clubs gather their membership from Princeton and, in turn, provide the service of feeding Princeton students. Frank, supra, 120 N.J. at 104.

Such a finding could not be made about most fraternities and sororities. Generally national organizations, fraternities and sororities exist at numerous universities but do not gather their membership from any one university.[8] Thus, most such organizations could easily exist apart from any one university.

Given these and other significant differences between fraternities and Tiger Inn, this case is not an appropriate vehicle to determine whether fraternities and sororities should have a right to discriminate. Each case will have widely varying facts, and those facts will shape the outcome of those cases. While a Court might correctly find that one particular fraternity has a right to discriminate based on the facts involving that fraternity, the same Court might correctly find another fraternity must stop discriminating. This Court

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8. For a discussion of the benefits to national affiliation that most fraternities have, see Fraternities and Sororities on the Contemporary College Campus, Winston, Nettles, & Opper, Jr., editors, Jossey Bass, Inc., 1987, pages 30-31.

should allow the states leeway in applying their individual laws to different factual situations. In short, there is no reason for this Court to step in at this time.

CONCLUSION

For the foregoing reasons, respondent, Sally Frank, respectfully requests that this Court not issue the Writ of Certiorari.

Respectfully submitted,

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